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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JORGE ROJAS, Plaintiff and Appellant, v. BANK OF AMERICA, N.A. et al., Defendants and Respondents.	E068405 (Super.Ct.No. CIVDS1609519) OPINION

APPEAL from the Superior Court of San Bernardino County. Donald R. Alvarez, Judge. Affirmed.

Law Offices of Frank A. Weiser and Frank Weiser for Plaintiff and Appellant.

Severson & Werson, Jan T. Chilton and Kerry W. Franich for Defendants and Respondents Bank of America, N.A, Bank of New York Mellon, N.A.

Dinsmore & Sandelmann, Frank Sandelmann, Lewis Stevenson, and Joshua Valene for Defendant and Respondent Duke Partners II, LLC.

Plaintiff, Jorge Rojas, defaulted on a real estate loan from defendants Bank of America, NA (BA), Bank of New York Mellon, NA (BNYM), resulting in foreclosure and a trustee's sale of the property, which was purchased by defendant Duke Partners II, LLC (Duke). Plaintiff's second amended complaint (SAC) against defendants for violation of "AB 278/SB 900," unfair business practice (Bus. & Prof. Code, § 17200, et seq.), and quiet title/injunctive relief, was dismissed without leave to amend following the trial court's ruling sustaining BA and BNYM's (collectively the Banks) demurrer, and Duke's motion for judgment on the pleadings. The trial court found that the SAC included new causes of action without leave of court, and that Duke was a bona fide purchaser. Plaintiff appealed.

On appeal, plaintiff challenges the trial court's orders sustaining the demurrers without leave to amend and the motion for judgment on the pleadings. We affirm.

BACKGROUND

In August 2005, plaintiff purchased the real property in question, and obtained financing in the amount of $120,000 from Aames Funding Corp.[1] In 2011, Aames assigned the loan and deed of trust to BNYM. Plaintiff defaulted on the loan, and sought bankruptcy protection in 2012, listing the subject real estate as the source of rental

[1] Defendant Duke submitted a request that we take judicial notice of the deed of trust, the trustee's deed upon sale, Duke's unlawful detainer complaint against plaintiff, and the judgment in the unlawful detainer action. That request was deferred to us to decide in connection with the appeal. We note that the trial court previously granted judicial notice of those documents in the trial court, and copies of each are in the record on appeal. Taking judicial notice of the same documents again would be surplusage. The request is denied.

income. Plaintiff reaffirmed the secured loans in the bankruptcy proceeding, and obtained two loan modifications in 2014. A third loan modification request was made in 2016, but apparently was not completed for lack of documents.[2] In the meantime, BNYM substituted Quality Loan Service Corp. (Quality) as trustee on the deed of trust. Quality recorded a notice of default against plaintiff in 2014.

The trustee's sale took place on May 24, 2016, and the property was purchased by Duke at that sale. In June 2016, Duke filed an unlawful detainer action against plaintiff and the occupants of the property, and a default judgment for possession was entered in favor of Duke.

Plaintiff filed his original complaint for wrongful foreclosure and void third party purchase on June 16, 2016, alleging four causes of action for: (1) fraud and forgery; (2) violation of Uniform Commercial Code 8-302 for non-bona fide purchase; (3) to set aside a defective foreclosure sale; and (4) violation of the Homeowners' Bill of Rights dual tracking provisions.

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[2] In his second amended complaint, plaintiff alleges that the first loan modification was denied after the trial period because BNYM could not verify plaintiff's occupancy. He went on to allege that one year later, the second loan modification was initially approved but then denied, although he does not explain the reasons for the denial. The complaint then states that the third loan modification case was opened and approved, but did not provide any documentation to show the approval or that payments were made timely, as he alleged. We have noted that in plaintiff's bankruptcy filing, the address for the property in question is not listed as plaintiff's residence address. Plaintiff's bankruptcy filings also indicate he received $2300 per month in rents from real property. From the pleadings and the documents of which the trial court granted judicial notice, we surmise that the property in question was not plaintiff's residence. Further, from the absence of an allegation or of evidence in support of an allegation that plaintiff's third loan modification had been approved, we presume it was not.

Duke filed an answer to the complaint, but the Banks demurred to the complaint. The demurrer was sustained as to the first cause of action with leave to amend, and was overruled as to the third cause of action, but the demurrer was sustained without leave to amend as to the second and fourth causes of action.

In September 2016, plaintiff filed his first amended complaint. This complaint alleged a single cause of action for fraud and forgery. Duke filed a motion for judgment on the pleadings, and the Banks again demurred. The Banks' demurrer was sustained pending a ruling on Duke's motion for judgment on the pleadings, which was granted with leave to amend

The second amended complaint (SAC) was filed on December 22, 2016 and comprised three causes of action for: (1) Violation of AB 278/SB 900; (2) violation of the Unfair Competition Law (Bus. & Prof. Code, § 17200); and (3) quiet title, declaratory and injunctive relief. On January 24, 2017, Duke filed a motion for judgment on the pleadings, asserting that the SAC pled new causes of action following the prior order granting the prior pleading challenges, without seeking leave of court to add the new claims. Duke also asserted that it was a bona fide purchaser, whose title is invulnerable to challenge. Duke also argued that principles of res judicata precluded plaintiff's fraud and quiet title claims where a judgment was entered on its prior unlawful detainer action, affirming Duke's right of possession of the premises, and that plaintiff's failure to allege he had tendered the amount of the secured debt precluded him from setting aside the foreclosure.

Shortly thereafter, the Banks filed a demurrer and a motion to strike the SAC. The demurrer also asserted that plaintiff failed to seek or obtain leave of court to allege new and different causes of action, and that the claims were barred by principles of res judicata because the causes of action were based on the assertion defendants engaged in dual-tracking, in violation of the Home Buyers Bill of Rights, which claim had been previously dismissed with prejudice.

On March 27, 2017, the court sustained the demurrers without leave to amend, and denied the motion to strike as moot in light of the ruling on the demurrer. A judgment of dismissal was entered in favor of the Banks. Judgment was also entered in favor of Duke. Plaintiff appealed on May 26, 2017.

DISCUSSION

"On appeal, '[w]hen a demurrer [has been] sustained, we determine whether the complaint states facts sufficient to constitute a cause of action [citation], and when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse' [Citations.]" (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1100; see also, *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) If the complaint can be cured, the trial court has abused its discretion in sustaining without leave to amend. (*Blank v. Kirwan, supra,* at p. 318; see also, *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 481-482.) We treat the demurrer as admitting all material

facts properly pleaded, but we do not assume the truth of contentions, deductions or conclusions of law. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.)

In reviewing a challenge to a trial court's ruling on a demurrer, we determine de novo whether the complaint alleges facts sufficient to state a cause of action under any legal theory. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) We liberally construe the pleading to achieve substantial justice between the parties, giving the complaint a reasonable interpretation and reading the allegations in context. (Code Civ. Proc., § 452; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) The judgment must be affirmed if it is correct on any ground stated in the demurrer, regardless of the trial court's stated reasons. (*Aubry v. Tri-City Hospital Dist., supra,* 2 Cal.4th at p. 967; *Fremont Indem. Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 111.)

Where a demurrer has been sustained with leave to amend, a "plaintiff may not amend a complaint to add a new cause of action without obtaining permission to do so, unless the new cause of action is within the scope of the order granting leave to amend." (*Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1023 (*Harris*), citing *Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995, 1015.) And when a party chooses to amend the complaint, the prior complaint is superseded for all purposes. (*Bassett v. Lakeside Inn, Inc.* (2006) 140 Cal.App.4th 863, 869-870, citing *Anmaco, Inc. v. Bohlken* (1993) 13 Cal.App.4th 891, 901.)

Here, the SAC comprised three causes of action: The first cause of action of the SAC purports to state a claim under Assembly Bill 278 (A.B. 278) and Senate Bill 900, but it actually realleges a claim for violation of the Homeowners Bill of Rights (Civ. Code, § 2923.6), specifically the dual tracking violations. Unfortunately, that cause of action was dismissed following the order sustaining BA's demurrer without leave to amend.

The second and third causes of action (violation of the Unfair Competition Law and for quiet title) of the SAC were new causes of action, not previously pled in either the original or first amended complaint. The granting of leave to amend the fraud and forgery cause of action did not give plaintiff permission to file new and different causes of action for which leave had not been granted. (*Community Water Coalition v. Santa Cruz County Local Agency Formation Com.* (2011) 200 Cal.App.4th 1317, 1329.)

The plaintiff omitted the fraud and forgery count from the SAC, although the trial court had granted leave to amend it when it sustained the demurrer to the first amended complaint. By omitting this claim, plaintiff abandoned it, because the SAC superseded the prior version of the complaint, which ceases to perform any function as a pleading. (*Lee v. Bank of America* (1994) 27 Cal.App.4th 197, 215.)

The first cause of action was thus barred by the earlier dismissal, while the second and third causes of action were barred because plaintiff failed to seek leave of the court to add new causes of action in the SAC. (*Harris, supra,* 185 Cal.App.4th at p. 1023.) On these procedural grounds alone, we may affirm the trial court's rulings. But even if the

procedural hurdle had been overcome, there were fatal errors in the pleading that plaintiff obviously could not correct, and which would have warranted dismissal.

a. *Purported Claim for Violation of A. B. 278/Senate Bill 900.*

A. B. 278, passed in 2012 (2012 Stats., ch. 86), amended several code sections and added others relating to home mortgages. Among the statutes affected by A.B. 278 was Civil Code section 2923.6. Senate Bill 900, also passed in 2012 (2012 Stats., ch. 87), covered the same subject. Civil Code section 2923.6 was repealed effective January 1, 2018, and replaced by a new version of the code section, effective September 14, 2018. (S.B. 818, 2018 Stats., ch. 404.) Section 26 of Senate Bill 818 bridges the gap between the repealed version and the new version, providing that the section that was amended, added or repealed shall be treated as still remaining in force for purposes of legal action.

Civil Code section 2923.6, referred to as the Homeowner's Bill of Rights, or HBOR (see, *Valbuena v. Ocwen Loan Servicing, LLC* (2015) 237 Cal.App.4th 1267, 1272), effective January 1, 2013, was enacted "to ensure that, as part of the nonjudicial foreclosure process, borrowers are considered for, and have a meaningful opportunity to obtain, available loss mitigation options, if any, offered by or through the borrower's mortgage servicer, such as loan modifications or other alternatives to foreclosure." (Civ. Code § 2923.4, subd. (a); *Valbuena v. Ocwen Loan Servicing, supra*, 237 Cal.App.4th at p. 1272.)

The HBOR prohibits "dual tracking," the situation in which a bank forecloses on a loan while negotiating with the borrower to avoid foreclosure. (*Valbuena*, *supra*, 237

Cal.App.4th at p. 1272.) If the borrower submits a "completed application" for a first lien loan modification, then "a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or notice of sale, or conduct a trustee's sale, while the complete first lien loan modification application is pending." (Civ. Code, former § 2923.6, subd. (c), added by Stats. 2012, ch. 86, § 7, ch. 87, § 7 and repealed by Stats. 2012, ch. 86, § 7, ch. 87, § 7, eff. Jan. 1, 2018.)

For violations of the remedial provisions of the Act, a borrower may sue for injunctive relief if the foreclosure sale has not been completed or may sue for damages after a foreclosure sale has resulted in the transfer of title. (Civ. Code, § 2924.12, subd. (a)(1)-(2).) After a trustee's deed upon sale has been recorded, a borrower may sue for "actual economic damages." (Civ. Code, § 2924.12, subd. (b); *Valbuena v. Ocwen Loan Servicing, LLC, supra*, 237 Cal.App.4th at p. 1273.) In such situations, there is no requirement that a borrower must tender the loan balance before filing suit based on a violation of the requirements of the law. (*Valbuena, supra*, at p. 1273.)

However, where a foreclosure sale has been completed, a debtor must allege tender of the amount of the secured debt. (*Shuster v. BAC Home Loans Servicing, LP* (2012) 211 Cal.App.4th 505, 512, citing *Karlsen v. American Sav. & Loan Assn.* (1971) 15 Cal.App.3d 112, 117; *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1109.)

Additionally, the HBOR applies only to first lien mortgages or deeds of trust that are secured by "owner-occupied residential real property containing no more than four

dwelling units." (Civ. Code, § 2924.15, subd. (a); *Herrejon v. Ocwen Loan Servicing, LLC* (2013) 980 F. Supp.2d 1186, 1209-1210.) The term "owner-occupied" means that the property is the principal residence of the borrower and is security for a loan made for personal, family, or household purposes. (Civ. Code, § 2924.15, subd. (a).) In the present case, plaintiff failed to allege—after multiple attempts—that the mortgage or deed of trust was secured by "owner-occupied residential real property," rendering that cause of action defective under the HBOR.

Plaintiff also failed to allege that he tendered payment of the loan balance, and there are no facts or documents subject to judicial notice demonstrating that plaintiff did so, such that the complaint could be amended. While tender is not a prerequisite to relief under the HBOR, as a general rule, a plaintiff may not challenge the propriety of a foreclosure sale of his or her property without offering to repay what he or she borrowed against the property. (*Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1053, citing *Karlsen v. American Sav. & Loan Assn.* (1971) 15 Cal.App.3d 112, 117.)

Thus, while there are some equitable exceptions not applicable here, an action to set aside a trustee's sale for irregularities in sale notice or procedure should be accompanied by an offer to pay the full amount of the debt for which the property was security. (*Fpci Re-Hab 01 v. E & G Invs.* (1989) 207 Cal.App.3d 1018, 1021, citing *Arnolds Management Corp. v. Eischen* (1984) 158 Cal.App.3d 575, 578; *Karlsen, supra*, 15 Cal.App.3d at p. 117.) This rule, traditionally applied to trustors, is based upon the

equitable maxim that a court of equity will not order a useless act performed. (*Arnolds, supra*, at pp. 578-579.) "A valid and viable tender of payment of the indebtedness owing is essential to an action to cancel a voidable sale under a deed of trust." (*Karlsen, supra*, at p. 117.)

Because plaintiff failed to allege that the property was owner-occupied, and because the foreclosure sale and transfer of title were complete prior to the initiation of the action, tender of the loan balance was a prerequisite to relief and the absence of appropriate allegations of tender in the complaint rendered both the HBOR and quiet title claims fatally defective.

b. *Purported Claim for Unfair Business Practice*

The SAC includes a cause of action for violating his statutory rights under Business and Professions Code, section 17200, et seq., the Unfair Competition Act (UCA), by engaging in the prohibited practice of dual tracking. The UCA defines unfair competition as any unlawful, unfair or fraudulent business act or practice, and unfair, deceptive, untrue or misleading advertising. (Bus. & Prof. Code, § 17200; *Stevens v. Superior Court* (1999) 75 Cal.App.4th 594, 602.)

To the extent the UCA claim is based on unlawful dual tracking activity, plaintiff has tried to circumvent the court's ruling on the demurrer to the HBOR claim of the original complaint. Because the unfair competition claim utilizes the HBOR as its triggering statute, if no violation of the Act has been demonstrated, the entire cause of action must be stricken. (See *Ingels v. Westwood One Broadcasting Services, Inc*. (2005)

129 Cal.App.4th 1050, 1068; see also *Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 937-841 [explaining that Bus. & Prof. Code, section 17200 borrows violations of other laws].)

Plaintiff cannot allege the dual tracking violation as the basis for the UCA claim because that cause of action was dismissed with prejudice, so the UCA claim of the SAC is ineffectual. Plaintiff does not allege any other unlawful business practice of defendant Banks which would support a UCA claim, so the SAC was fatally defective in realleging the dual tracking claim. The trial court correctly sustained the demurrer as to this cause of action without leave to amend.

c. *Purported Claims for Quiet Title, Declaratory and Injunctive Relief.*

A quiet title cause of action generally has two elements: (1) "the plaintiff is the owner and in possession of the land," and (2) "the defendant claims an interest therein adverse to [the plaintiff]." (Code Civ. Proc., § 761.020; *South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 740; see *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 802-803.) "To bring an action to quiet title, a plaintiff must allege he or she has paid any debt owed on the property." (*Ferguson v. Avelo Mortgage* (2011) 195 Cal.App.4th 1618, 1623.) As alluded to above, the SAC omits to include an allegation of tender, and the documents and exhibits subject to judicial notice, coupled with the fact plaintiff's original complaint was subject to demurrer for the same defect, demonstrates plaintiff could not and cannot cure this defect.

As to injunctive relief, HBOR provides remedies for violation of the foregoing statutory provision in Civil Code, section 2924.12: "'If a trustee's deed upon sale has not been recorded, a borrower may bring an action for injunctive relief … ,' which injunction shall remain in place 'until the court determines that the mortgage servicer … has corrected and remedied the violation or violations giving rise to the action for injunctive relief.' [Citation.]" (*Valbuena v. Ocwen Loan Servicing, LLC, supra*, 237 Cal.App.4th at p. 1273; Civ. Code, § 2924.12, subd. (a)(1)–(2).) "The injunctive relief provided under the HBOR is limited to material violations of Civil Code, sections 2933.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17." (Civ. Code, § 2924.12, subd. (a)(1); see *Lucioni v. Bank of America, N.A.* (2016) 3 Cal.App.5th 150, 158-159.) Such statutory violations were not properly alleged in the SAC, due to the dismissal of the HBOR cause of action of the original complaint.

Plaintiff's complaint for injunctive relief seeks to rescind the trustee's sale of the property. This relief is not authorized because, where a trustee's deed upon sale has been recorded, injunctive relief is not available under the HBOR; the borrower may seek economic damages. (Civ. Code, § 2924.12, subd. (b).) Here, the trustee's deed upon sale was recorded prior to bringing the action, precluding injunctive relief. The trial court properly sustained the demurrer without leave to amend.

d. *Duke's Motion for Judgment on the Pleadings*

Duke purchased the property at the foreclosure sale in May 2016, so Duke was not party to anything that led up to the sale. The complaint does not allege that Duke

conspired with or was an agent or employee of the Banks. In short, there was nothing in the SAC to support any inference other than that Duke was a bona fide purchaser. Thus, the trial court granted Duke's motion for judgment on the pleadings.

On appeal, plaintiff asserts the trial court erroneously granted the motion, arguing that plaintiff was not required to allege tender, and that Duke was not a bona fide purchaser because the purchase price paid by Duke ($150,000), was understated. We disagree.

"A motion for judgment on the pleadings is tantamount to a general demurrer [citations], although it is not governed by statute and may be made at any time prior to a final judgment. [Citations.]" (*Orange Unified Sch. Dist. v. Rancho Santiago Cmty. College Dist.* (1997) 54 Cal.App.4th 750, 764-765, citing *MacIsaac v. Pozzo* (1945) 26 Cal. 2d 809, 812-813; see also, *Tiffany v. Sierra Sands Unified School Dist.* (1980) 103 Cal.App.3d 218, 224.) "On appeal from the granting of the motion, the standard of review is the same as for a judgment of dismissal following the sustaining of a general demurrer." (*Ramirez v. USAA Casualty Ins. Co.* (1991) 234 Cal.App.3d 391, 397; *Tiffany*, *supra*, at p. 225.)

"'[A] bona fide purchaser for value who acquires his interest in real property without notice of another's asserted rights in the property takes the property free of such unknown rights. [Citations.]' [Citations.]" (*Melendrez v. D & I Investment, Inc.* (2005) 127 Cal.App.4th 1238, 1251.) """The elements of a bona fide purchaser are payment of value, in good faith, and *without actual or constructive notice of another's rights*.

[Citation.]" [Citation.]' [Citation.]" (*Ibid*.) "'[A] bona fide purchaser for value who acquires his interest in real property without notice of another's asserted rights in the property takes the property free of such unknown rights.'" (*Deutsche Bank National Trust Co. v. Pyle* (2017) 13 Cal.App.5th 513, 521, quoting *Hochstein v. Romero* (1990) 219 Cal.App.3d 447, 451.)

"The first element does not require that the buyer's consideration be the fair market value of the property (or anything approaching it)." (*Melendrez v. D & I Investment, Inc., supra,* 127 Cal.App.4th at p. 1251.) "Instead, the buyer need only part with something of value in exchange for the property." (*Ibid*; see *Horton v. Kyburz* (1959) 53 Cal.2d 59, 65–66 [rejecting contention that BFP must give "adequate consideration" sufficient to obtain specific performance of a contract].) "Neither appraisal nor judicial determination of fair market value is required as part of nonjudicial foreclosure of real property securing a loan." (*Dreyfuss v. Union Bank of Cal*. (2000) 24 Cal.4th 400, 409, citing *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1236.)

"Nor is there any requirement that the sales price approximate the fair market value of the property." (*Dreyfuss, supra*, 24 Cal.4th 400 at p. 409.) Where there is no irregularity in a nonjudicial foreclosure sale and the purchaser is a bona fide purchaser for value, a great disparity between the sales price and the value of the property is not a sufficient ground for setting aside the sale. (*Alliance Mortgage Co. v. Rothwell, supra,* 10 Cal.4th at p. 1237, citing *Moeller v. Lien* (1994) 25 Cal.App.4th 822, 832.)

Thus, while "'the "adequacy" or amount of the consideration given by a subsequent purchaser or encumbrancer may reflect upon his "good faith," it does not preclude the consideration from being "valuable."' [Citations.]" (*Melendrez v. D & I Investment, Inc., supra,* 127 Cal.App.4th at p. 1251.) The issue of whether a buyer is a bona fide purchaser is ordinarily a question of fact. (*OC Interior Services, LLC v. Nationstar Mortgage, LLC* (2017) 7 Cal.App.5th 1318, 1331, citing *612 South LLC v. Laconic Limited Partnership* (2010) 184 Cal.App.4th 1270, 1279.)

There are no facts alleged in the complaint that would support an inference that Duke purchased the property at the foreclosure sale with knowledge of plaintiff's asserted rights. After all, the nonjudicial foreclosure and consequent foreclosure sale were completed prior to the Duke's purchase and all relevant documents were recorded. As for plaintiff's assertion that the consideration was inadequate, the SAC does not allege a great disparity between the value of the property and the purchase price. Thus, the trial court correctly found that Duke was a bona fide purchaser and granted judgment on the pleadings.

DISPOSITION

The judgment is affirmed. Respondents are entitled to costs on appeal.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

FIELDS
J.